

PJS:MAS:jmh

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JEFFREY S. CLARK,	:	NO. 3:CV-10-00026
Plaintiff	:	
	:	(Caputo, J.)
v.	:	
	:	
LT. J. FLEMING, et al.	:	
Defendants	:	Filed Electronically

**BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR LEAVE
TO DEPOSE PLAINTIFF PURSUANT TO FED. R. CIV. P. 30(a)(2)**

NOW COME Defendants, by and through their counsel, Peter J. Smith, United States Attorney for the Middle District of Pennsylvania, and Melissa A. Swauger, Assistant United States Attorney, who hereby file this brief in support of their motion for leave to take Plaintiff's deposition pursuant to Fed. R. Civ. P. 30(a)(2).

I. Procedural History

Clark filed this Bivens action on January 6, 2010. By January 12, 2010 Order, this Court directed service of the complaint. On January 25, 2010, Clark filed a motion to appoint counsel, which was denied on January 26, 2010. On January 27, 2010, the individual Defendants were served, and the United States Attorney's Office was served January 29, 2010.

On March 11, 2010, Clark filed a motion for temporary restraining order, but failed to file a supporting brief. On March 24, 2010, Clark also filed a request for production of documents, but this document was never properly served on Defendants.

On March 30, 2010, Defendants filed an enlargement request, which was granted on April 1, 2010, rendering Defendants' response due by April 30, 2010. On April 2, 2010, Clark filed a declaration for entry of default. On April 20, 2010, Defendants filed a motion to seal with a supporting brief and a sealing statement, which was denied by May 3, 2010 Court Order. On April 30, 2010, Defendants filed a motion to dismiss and for summary judgment.

On May 3, 2010, Clark filed a brief in opposition to Defendants request for enlargement of time.

On May 13, 2010, Defendants filed a motion for protective order and a motion to exceed page limitation with a supporting brief. Defendants also filed a motion for extension of time to file their brief in support of their dispositive motion and statement of material facts.

On May 19, 2010, the Court issued an Order denying Defendants' motion for protective order, and granting Defendants' motions to exceed page limitation and for extension of time to file supporting brief. On May 26, 2011, Defendants filed their

brief in support of their dispositive motion and a statement of material facts. On June 21, 2011, Clark opposed the motion, moved the Court to dismiss “unculpable defendants,” and filed a declaration. On July 6, 2010, Defendants filed their reply brief.

On July 23, 2011, Clark filed another motion to appoint counsel which was denied on February 14, 2011. In addition, Clark’s motion to dismiss “unculpable defendants” was granted, and his motion for preliminary injunction was deemed withdrawn for failure to file a supporting brief.

On March 9, 2011, the Court issued a Memorandum granting Defendants’ motion for summary judgment with respect to Clark’s Eighth Amendment medical claim against Lt. Galletta and dismissed Lt. Galletta from the action. The Court also granted Defendants’ motion to dismiss with respect to Clark’s conspiracy claim against all defendants and Clark’s claims dismissing Warden Bledsoe and Unit Manager Brewer. Finally, the Court denied Defendants’ motion for summary judgment with respect to Clark’s Eighth Amendment excessive use of force claim against officer Kulago and Lt. Fleming. On March 31, 2011, Defendants Fleming and Kulago filed an answer to Clark’s Complaint.

On April 8, 2011, Clark filed a third motion to appoint counsel which was denied on April 18, 2011. Also on April 18, 2011, the Court issued a case

management order directing the completion of discovery by September 30, 2011, and pre-trial motions by October 31, 2011.

A motion seeking leave to depose the inmate plaintiff pursuant to Fed. R. Civ. P. 30(a)(2) has been filed contemporaneously with this brief. This brief is submitted in support of that motion in accordance with M.D. Pa. Local Rule 7.5.

II. Question Presented

Should the Defendants be granted leave to depose the inmate plaintiff?

Suggested answer in the affirmative.

III. Argument

Defendants submit that the deposition of Clark is necessary for the factual development of this case. Pursuant to Fed. R. Civ. P. 30(a)(2), “[a] party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison....” Clark is confined in prison and, therefore, Defendants are required to request leave of this Court to depose Clark. See Wright & Miller, 8A Fed. Prac. & Proc. Civ.2d §2104.

In that Clark is the Plaintiff, he obviously possesses relevant knowledge about the allegations in the Complaint and the injuries and damages he claims to have suffered. By deposing Clark, Defendants will be able to address the issues

and facts concisely and cogently, appropriately respond to the allegations of the Complaint, and/or prepare for trial. See Miller v. Bluff, 131 F.R.D. 698, 700 (M.D. Pa. 1990)(concluding that “[t]he plaintiff himself started this lawsuit and any defendant surely is entitled to take his deposition in conjunction therewith”). Accordingly, in order to properly defend Clark’s suit, Defendants Fleming and Kulago and should be granted to depose Clark.

IV. Conclusion

WHEREFORE, for the reasons stated above, leave of this Court to depose Clark should be granted.

Respectfully submitted

PETER J. SMITH
United States Attorney

Date: May 25, 2011

s/ Melissa A. Swauger
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**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JEFFREY S. CLARK, Plaintiff v. LT. J. FLEMING, et al. Defendants	: : : : : : : :	NO. 3:CV-10-0026 (Caputo, J.) Filed Electronically
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CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion as to be competent to serve papers.

That on May 25, 2011, she served a copy of the attached

**DEFENDANTS' BRIEF IN SUPPORT OF MOTION
TO DEPOSE PLAINTIFF PURSUANT TO FED. R. CIV. P. 30(a)(2)**

by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Harrisburg, Pennsylvania.

Addressee:

Jeffrey Clark
19776-045
USP FLORENCE ADMAX
P.O. Box 8500
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/s/ Joanne M. Hoffman
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